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Supreme Court, U.S.
FILED
FEB 5 2003
CLERK

No. 02-322

In The
Supreme Court of the United States

UNITED STATES DEPARTMENT OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,

Petitioner,

v.

CITY OF CHICAGO,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR *AMICUS CURIAE* THE NATIONAL SECURITY ARCHIVE IN SUPPORT OF RESPONDENT

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30 pp

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BRIEF FOR AMICUS CURIAE

The National Security Archive (the "Archive") respectfully submits this brief as *amicus curiae* in support of Respondent.[1]

INTEREST OF THE *AMICUS CURIAE*

The National Security Archive is an independent, nongovernmental research institute and library located at the George Washington University that collects and publishes declassified documents obtained through the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, concerning United States foreign policy and national security matters. The Archive also serves as a repository of declassified and released documents on a wide range of topics pertaining to the national security, foreign intelligence, and economic policies of the United States. In April 2000, the Archive was awarded a special George Polk Award for Journalism "for serving as an essential journalistic resource and for expanding access to previously classified documents."

As part of its mission to broaden access to the historical record, the Archive is a leading user of the FOIA. In addition, through litigation and public advocacy, it works to defend and expand public access to government information. In its 18-year history, the Archive has made over

[1] Counsel for the *amicus curiae* authored this brief in its entirety. No person or entity other than the *amicus curiae* and its counsel made a monetary contribution to the preparation of this brief. Letters of consent to the filing of this brief from all parties have been filed with the Clerk of the Court.

24,000 FOIA requests to over 40 government agencies. The Archive has published more than 500,000 pages of the documents it obtained pursuant to the FOIA in print books[2], microfiche and CD-ROM[3], and online.[4] The Archive has appeared before the Court on prior occasions to address the application of the FOIA.[5]

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[2] The Archive's over 20 print books include, among others: *The 1956 Hungarian Revolution: A History in Documents* (Csaba Bekes, et al., ed., Central University Press 2002); *Atomic Audit: The Costs and Consequences of U.S. Nuclear Weapons Since 1940* (Stephen I. Schwartz, ed., Brookings Institution Press 1998); Laurence Chang and Peter Kornbluh, *The Cuban Missile Crisis, 1962* (The New Press 1998); Vladislav M. Zubok and Constantine Pleshakov, *Inside the Kremlin's Cold War: From Stalin to Khrushchev* (Harvard University Press 1996); Tom Blanton, *White House E-Mail: The Top-Secret Computer Messages the Reagan/Bush White House Tried to Destroy* (The New Press 1995); Tina Rosenberg, *The Haunted Land: Facing Europe's Ghosts after Communism* (Random House 1995); Jeffrey T. Richelson, *America's Secret Eyes in Space: The U.S. Keyhole Satellite Program* (Harper & Row 1990); National Security Archive, et al., *The Chronology: The Documented Day-by-Day Account of Secret Military Assistance to Iran and the Contras* (Warner Books 1987).

[3] The Archive's microfiche collections include, among others: *China and the United States: From Hostility to Engagement, 1960-1998* (1999); *U.S. Nuclear History: Nuclear Arms and Politics in the Missile Age, 1955-1968* (1997); *El Salvador: War, Peace and Human Rights, 1980-1994* (1995); *U.S. Espionage and Intelligence: Organization, Operations, and Management, 1947-1996* (1997); *Presidential Directives on National Security from Truman to Clinton* (1994); *South Africa: The Making of U.S. Policy, 1962-1989* (1991); *Afghanistan: The Making of U.S. Policy, 1973-1990* (1990).

[4] In addition to making 17 of its microfiche collections accessible online, the Archive has published over 80 electronic briefing books that are available online.

[5] *See United States v. Weatherhead*, 527 U.S. 1063 (1999), *vacated and remanded*, 528 U.S. 1042 (1999) (appeared as *amicus curiae*); *Nat'l Sec. Archive v. Dep't of Def.*, 880 F.2d 1381 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1029 (1990) (respondent to petition for a writ of certiorari).

The Archive's interest in this case is to preserve public access to federal government records for any public or private purpose. The Archive files this *amicus curiae* brief solely to respond to the Bureau of Alcohol, Tobacco and Firearms' ("BATF") efforts to constrict the broad congressional purpose behind the FOIA. In this brief, the Archive presents a different view than that offered by the BATF concerning the Court's characterization of the FOIA's "central purpose" in *United States Department of Justice v. Reporters Committee for the Freedom of the Press*, 489 U.S. 749 (1989). This issue is crucial to the Archive – and to the public – because the Court's articulation of a "central purpose" standard for assessing the application of Exemptions 6 and 7(c) has affected the processing of FOIA requests by government agencies and the *de novo* judicial review of denials of FOIA requests in areas far beyond the distinctive law enforcement setting of this case. Accordingly, the Archive has a direct and substantial interest in the case before the Court.

SUMMARY OF ARGUMENT

The Freedom of Information Act establishes a presumption that *any person* is entitled to disclosure of information held by a federal government agency *for any public or private purpose*. The FOIA includes specifically delineated exemptions from disclosure that are to be narrowly construed in favor of disclosure and places the burden squarely on the government to justify withholding of records based on those exemptions.

Exemptions 6 and 7(c) of the FOIA speak to circumstances when the disclosure of specific types of government records threatens an invasion of a recognized right

to privacy. The courts have developed a balancing test to assess when such disclosure is warranted. In *Reporters Committee*, the Court limited those purposes weighing in favor of mandatory FOIA disclosure when disclosure would put privacy interests at risk. Under *Reporters Committee*, the government may choose to withhold records whose disclosure would impinge on privacy if disclosure does not focus on informing the people about "what their government is up to," *Reporters Committee*, 489 U.S. at 773, or "contribut[e] significantly to public understanding of the operations or activities of the government." *United States Dep't of Def. v. Fed. Labor Rel. Bd.*, 510 U.S. 487, 495 (1994) (quoting *Reporters Committee*, 489 U.S. at 775). Thus, instead of weighing the seriousness and nature of the impact on privacy on the one hand against any one of a wide range of public interest reasons to disclose information contained in law enforcement records on the other hand, only information that would meaningfully assist in the understanding of government "operations or activities" can be considered on the disclosure side of the scale.

The BATF now invites the Court to take a substantial and unwarranted step further in this case. As the BATF would apply the balancing test, private information in law enforcement records could be withheld despite the broad disclosure goals of the FOIA, "unless disclosure of the information at issue would meaningfully assist the public in *evaluating* the conduct of the federal government." Brief for Petitioner ("Pet. Br.") at 28 (emphasis added). At bottom, the BATF contends that the FOIA's access principles should be "irrelevant" unless the content of the records sought in this case will expose government illegality. Pet. Br. at 34. This approach would transform the FOIA into a tool merely for reacting to government

mistakes; it is not the balancing of private interests in confidentiality and public interests in access to information that was envisioned by Congress when it enacted the FOIA.

When Congress enacted the FOIA in 1966 and amended it in 1974, 1976, 1986, and, again, in 1996, the legislators viewed the purpose served by the FOIA broadly, and as not limited to merely unearthing government mismanagement and scandal. Repeatedly over the FOIA's 35-year history, Congress reformed the FOIA to ensure that it served the goal of establishing a right to know "what the government is up to." Congressional oversight activity and the legislative history demonstrate that Congress has been aware of how the FOIA has been used to understand the laws that will be enforced, to educate the electorate so that it can make informed policy decisions, and to provide access to a wide range of information collected by the myriad government agencies for public purposes, and with public funds, that bears on public health, safety, welfare and security, as well as to expose government corruption and waste. The BATF offers no justification for confining this broad "right to know" to only one of the multitude of reasons citizens are entitled to look into the workings of the government. Under the balancing test applied by the courts in Exemption 6 and 7(c) cases, *any* of these public interests served by knowledge of the government's operations and activities should be weighed against the nature and seriousness of the impact of disclosure on privacy before there is a determination that an agency may decide to withhold information. The Court should not now erode the FOIA's disclosure principles by shifting the burden of proof to the FOIA requester to prove that the contents of the requested

records would meet a newly narrowed purpose that has no basis in the statutory language or the legislative history.

Finally, if the Court reaches the issue of FOIA's "central purpose" in this case, no matter what the result, the Court should make clear that the "central purpose" standard is confined to the privacy balancing test, and has no broader impact on the public's entitlement to records under the FOIA. Already courts have extended the intended reach of the "central purpose" standard in analyzing diverse provisions of the FOIA, including the meaning of the terms "record" and "government agency." The plain language of the statute, the broad disclosure goals evidenced in the legislative history, and the Court's decision in *Reporters Committee* uniformly bar such over-reliance on the "central purpose" standard as a rationale for limiting access to government records beyond the privacy setting.

ARGUMENT

A. THE FOIA ESTABLISHED A JUDICIALLY ENFORCEABLE PRESUMPTION OF PUBLIC ACCESS TO GOVERNMENT INFORMATION, LIMITED ONLY BY NINE NARROWLY CONSTRUED EXEMPTIONS

The FOIA was enacted in 1966 after many years of congressional efforts to remove impediments to providing the public access to government records. Before enactment of the FOIA, Section 3 of the Administrative Procedure Act ("APA") governed disclosure of government records. *See* 5 U.S.C. § 1002 (1964). *See* S. Rep. No. 813 (1965), *reprinted in* Senate Committee On The Judiciary, Freedom Of

Information Act Source Book: Legislative Materials, Cases, Articles, S. Doc. No. 93-82 (1974) ("FOIA Source Book"), at 38; H.R. Rep. No. 1497 (1966), reprinted in FOIA Source Book at 26; *see Renegotiation Bd. v. Bannercraft Clothing Co., Inc.*, 415 U.S. 1, 12 (1974) (describing the FOIA's legislative history).

Section 3 of the APA was intended to make government records widely available, but it allowed agencies to withhold records on several ill-defined grounds, including any matter requiring "secrecy in the public interest" and for "good cause found."[6] Records not determined to be exempt from disclosure under these vague standards were available only to those "properly and directly concerned" with the matters covered by the records.[7] The Act was invoked more often by agencies seeking to withhold information than by citizens seeking access to information, and it afforded no recourse for those denied information.[8] Revision of the APA through the enactment of the FOIA "was deemed necessary because 'section 3 was generally recognized as falling far short of its disclosure goals and came to be looked upon more as a withholding statute

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[6] *See* H.R. Rep. No. 1497 (1966), *reprinted in* FOIA Source Book at 26.

[7] *Id.*

[8] *See* S. Rep. No. 813 (1965), *reprinted in* FOIA Source Book at 38 (APA described as "full of loopholes which allow agencies to deny legitimate information to the public."); H.R. Rep. No. 1497 (1966), *reprinted in* FOIA Source Book at 26 (noting that "[I]mproper denials [of requests for information] occur[red] again and again."); *id.* at 26 ("The Administrative Procedure Act provides no adequate remedy to members of the public to force disclosures in . . . cases [of improper withholding].").

than a disclosure statute.'" *Dep't of Air Force v. Rose*, 425 U.S. 352, 360 (1976) (quoting *Envtl. Prot. Agency v. Mink*, 410 U.S. 73, 79 (1973)).

In contrast to APA Section 3, the FOIA establishes a *presumptive right* for any person to obtain identifiable, existing records of federal agencies *without any showing of the reason the information is sought. See United States Dep't of State v. Ray*, 502 U.S. 164, 173 (1991) (the FOIA indicates "a strong presumption in favor of disclosure [that] places the burden on the agency to justify [] withholding . . . requested documents."). It replaced the easily circumvented APA provisions with "a general philosophy of full agency disclosure unless information is exempted under the clearly delineated statutory language." *Rose*, 425 U.S. at 360-61 (quoting S. Rep. No. 813 at 3 (1965)). Thus, in its central disclosure provision, the FOIA requires every agency,

> upon any request for records which . . . reasonably describes such records [to make such records] promptly available to any person.

5 U.S.C. § 552(a)(3). A FOIA requester need make no preliminary showing that disclosure would serve any public purpose.

As the Court explained,

> Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands.

Mink, 410 U.S. at 80.

The government is relieved of this mandatory obligation to provide public access only pursuant to nine "limited exemptions" from disclosure. *Rose*, 425 U.S. at 361 (quoted in *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1976)); *see also Nat'l Labor Rel. Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 135 (1975) ("As the Act is structured, virtually every document generated by an agency is available to the public in one form or another, unless it falls within one of the act's nine exemptions.").[9] These exemptions "do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Rose*, 425 U.S. at 361. The exemptions "are explicitly made exclusive" and "must be narrowly construed." *Id.*; *see also Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989) ("[c]onsistent with the Act's goal of broad disclosure, these exemptions have been consistently given a narrow compass"); *FBI v. Abramson*, 456 U.S. 615, 630 (1982) ("FOIA exemptions are to be narrowly construed."). "[U]nless the requested material falls within one of these nine statutory exemptions, FOIA requires that records and material in the possession of federal agencies be made available on demand to any member of the general public." *NLRB v.*

[9] These exemptions permit an agency to deny access to records, or portions of records, if, broadly speaking, the information (1) is classified for national defense or foreign policy purposes; (2) relates solely to an agency's internal personnel rules and practices; (3) has been clearly exempted under other laws; (4) contains confidential business information; (5) consists of internal government deliberative communications about a decision before an announcement; (6) consists of certain information about an individual that, if disclosed, would cause a clearly unwarranted invasion of personal privacy; (7) consists of law enforcement records in certain circumstances; (8) concerns bank supervision; and (9) consists of geological or geophysical information. *See* 5 U.S.C. § 552(b).

Robbins Tire & Rubber Co., 437 U.S. 214, 221 (1978). The FOIA also "vested the courts with the responsibility ultimately to determine 'de novo' any dispute as to whether [an] exemption was properly invoked in order to constrain agencies from withholding nonexempt matters." *Rose*, 425 U.S. at 379. Moreover, "[u]nlike review of other agency action that must be upheld if supported by substantial evidence and not arbitrary or capricious, the FOIA expressly places the burden 'on the agency to sustain its action [in withholding documents].'" *Reporters Committee*, 489 U.S. at 754.

The FOIA's legislative history highlights the breadth and consequence of the considerations prompting passage of this revolutionary law:

- "A democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quantity and quality of its information varies. . . . [The FOIA] provides the necessary machinery to assure the availability of Government information necessary to an informed electorate."[10]
- "[T]he theory of an informed electorate is so vital to the proper operation of a democracy" that there is a need for a statute that "affirmatively provides for a policy of disclosure."[11]

[10] H.R. Rep. No. 1497 (1966), *reprinted in* FOIA Source Book at 33.

[11] S. Rep. No. 813 (1965), *reprinted in* FOIA Source Book at 38.

- The "very vastness of government and its myriad agencies make it difficult for the electorate" to gain access to public information."[12]
- Prior to the FOIA, a government agency refused to "publish its rules and a description of its organization and method of operation."[13]
- Prior to the FOIA, a government agency used the excuse that "secrecy 'in the public interest'" justified withholding cost estimates by unsuccessful bidders for a government contract.[14]

The congressional intent was reflected in President Johnson's signing statement, in which he declared:

> This legislation springs from one of our most essential principles: A democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest.[15]

[12] *Id.*

[13] H.R. Rep. No. 1497 (1966), *reprinted in* FOIA Source Book at 26.

[14] *Id.*

[15] President Johnson's Statement Upon Signing the Freedom of Information Act, 316 Pub. Papers 699 (July 4, 1966). Moreover, the statements of a wide range of legislators at the passage of the Act similarly reflect this general purpose of permitting citizens access to information. *E.g.*, 112 Cong. Rec. 13007 (1966) (statement of Rep. Donald Rumsfeld), *reprinted in* FOIA Source Book at 71, 72 ("We have said that ours is a government guided by citizens. From this it follows that government will serve us well only if the citizens are well informed."; "[D]isclosure of Government information is particularly important today because Government is becoming involved in more and

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As the Court has noted in its FOIA decisions, Congress was "principally interested in opening administrative processes to the scrutiny of the press and general public," *Bannercraft*, 415 U.S. at 17; "enabl[ing] the public to have sufficient information in order to be able, through the electoral process, to make intelligent, informed choices with respect to the nature, scope, and procedure of federal governmental activities," *id.*; permit for "an informed electorate," *id.*; "eliminat[ing] [ ] secret law," *Reporters Committee*, 489 U.S. at 796 n. 20; and "promot[ing] honesty and reduc[ing] waste in government by exposing official conduct to public scrutiny." *Id.*

Throughout the FOIA's 35-year history, Congress has repeatedly reaffirmed these broad purposes.[16] Most recently in 1996, Congress added a Findings section to the FOIA that states that the FOIA requires "agencies of the Federal Government to make certain agency information available . . . *for any public or private purpose*." 5 U.S.C. § 552 (1996) (Findings) (emphasis added).[17]

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more aspects of every person's personal and business life, and so access to information about how Government is exercising its trust becomes increasingly important.").

[16] The FOIA was amended in 1974, 1976, 1986, and 1996.

[17] The House Report concerning the 1996 amendments explains: "The findings make clear that Congress enacted the FOIA to require Federal agencies to make records available to the public through public inspection and at the request of any person for any public or private use." H.R. Rep. No. 104-795 at 19 (1996).

B. THE COURT SHOULD REJECT THE BATF'S NARROW ARTICULATION OF THE RELEVANT PUBLIC INTERESTS THAT MAY BE CONSIDERED IN DETERMINING WHETHER TO DISCLOSE INFORMATION THAT MAY THREATEN PERSONAL PRIVACY INTERESTS

This case concerns, *inter alia*, one of two of the FOIA exemptions that, in their present form, speak to the impact of disclosure of information on personal privacy. The two exemptions are Exemption 6, which permits nondisclosure of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," and Exemption 7(c), which permit the nondisclosure of "investigatory records compiled for law enforcement purposes," but only to the extent that producing such records would involve one of six specified dangers, including:

> to the extent that the production . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy.

5 U.S.C. § 552(b)(7)(c).[18]

This case involves the invocation of Exemption 7(c) by the Bureau of Alcohol, Tobacco and Firearms to withhold

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[18] Exemption 6 is limited to cases of "clearly unwarranted" invasions of privacy, while Exemption 7(c) applies only in cases where disclosure "could reasonably be expected to constitute an unwarranted" invasion of privacy. The standard for evaluating a threatened invasion of privacy interests resulting from the disclosure of records compiled for law enforcement purposes is somewhat broader than the standard applicable to personnel, medical, and similar files. *Reporters Committee*, 489 U.S. at 785.

from disclosure the names and addresses of private individuals in its gun trace database, including the locations where traced firearms were recovered, and the names and addresses of retail firearms purchasers in its multiple sales database, which records the sale or disposal of two or more guns to an unlicensed person within any five consecutive business days. The BATF contends that there would be an unwarranted invasion of privacy if the withheld information were released.

When faced with a governmental effort such as this to withhold documents on privacy grounds, the courts early developed a balancing test to assess whether the public's interest in the requested information outweighed the seriousness of the impact on privacy. *See, e.g., Getman v. NLRB*, 450 F.2d 670, 677 n. 24 (D.C. Cir. 1971); *Wine Hobby USA, Inc. v. United States IRS*, 502 F.2d 133, 136 (3d Cir. 1974). In the distinctive context of weighing personal privacy against the substantial objective of ensuring the maximum possible disclosure, Congress recognized that a FOIA requester could have an equal or greater interest in disclosure than a third party could have in privacy, and therefore acknowledged a need to balance those interests to ensure the fullest possible disclosure.[19]

[19] The Senate Report explained:

> At the same time that a broad philosophy of 'freedom of information' is enacted into law, it is necessary to protect certain equally important rights of privacy with respect to certain information in Government files, such as medical and personnel records. It is also necessary for the very operation of our Government to allow it to keep confidential certain material, such as the investigatory files of the Federal Bureau of Investigation.

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Thus, the existence of a recognized privacy interest is not itself an automatic basis for non-disclosure.[20] Moreover, this sort of balancing test has not been applied to the other FOIA exemptions where Congress already struck the balance of the interests between the FOIA requester's interest in disclosure and the government's need for confidentiality and there is no comparable third party interest at stake.[21]

> It is not an easy task to balance the opposing interests, but it is not an impossible one either. It is not necessary to conclude that to protect one of the interests, the other must, of necessity, either be abrogated or substantially subordinated. Success lies in providing a workable formula which encompasses, balances, and protects all interests, *yet places emphasis on the fullest responsible disclosure.*
>
> S. Rep. No. 813 (1965), *reprinted in* FOIA Source Book at 38 (quoted in *Mink*, 410 U.S. at 80 n. 6) (emphasis added); *see also* H.R. Rep. No. 1497 (1966), *reprinted in* FOIA Source Book at 27 ("The right of the individual to be able to find out how his Government is operating can be just as important to him as his right to privacy and his right to confide in his Government. This bill strikes a balance considering all these interests.").

[20] Notably, the House Report accompanying the 1966 enactment of the FOIA describes one of the problems prior to the enactment of the FOIA as the "almost automatic refusal to disclose the names and salaries of Federal employees." H.R. Rep. No. 1497 (1966), *reprinted in* FOIA Source Book at 27.

[21] The balancing of interests originally applied only to Exemption 6. Under the original Act, Exemption 7 covered "investigatory files compiled for law enforcement purposes except to the extent available by law to a private party." Pub. L. No. 90-23, 81 Stat. 54 (1967). In 1974, in an effort to address concerns that law enforcement records were being withheld unjustifiably pursuant to Exemption 7, the Exemption was rewritten to permit the non-disclosure of "investigatory records compiled for law enforcement purposes," but only to the extent that producing such records would involve one of six enumerated dangers. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 222 (1978). Among

(Continued on following page)

The Court first endorsed the balancing approach in *Department of Air Force v. Rose* in the context of Exemption 6. There, the Court, referencing the legislative history of the initial enactment of the FOIA, again recognized that the FOIA exemptions are to be narrowly construed and explained that a balance of an individual's right to privacy against the purpose of the FOIA was necessary to prevent the withholding of non-confidential matter merely because the file containing the information was of a general type described by the exemption. *Rose*, 425 U.S. at 372.

In *Reporters Committee*, in the context of Exemption 7(c), for the first time, the Court limited the public interest criteria that could be relied on to justify disclosure of agency law enforcement records when that disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(c). In the specific context of an intrusion on personal privacy, the Court explained that the basic policy of the FOIA "focuses on the citizens' right to be informed about 'what their government is up to.'" *Reporters Committee*, 489 U.S. at 773 (emphasis in original). As the Court further explained in *United States Dep't of Def. v. Fed. Labor Rel. Bd.*, 510 U.S. 487 (1994), "the only relevant 'public interest in disclosure' to be weighed in [the balance against a threatened invasion of privacy] is the extent to which the disclosure would serve the 'core purpose of the FOIA,' which is 'contribut[ing] significantly

these amendments was the addition of personal privacy considerations. Act of Jan. 21, 1974 (amending Freedom of Information Act), Pub. L. No. 93-502, 88 Stat. 1561 (1974) (current version at 5 U.S.C. § 552(b)(7)(c) (1988)).

to public understanding of the operations or activities of government.'" 510 U.S. at 495 (quoting *Reporters Committee*, 489 U.S. at 775 (emphasis in original)).[22]

In this case, the BATF seeks to justify withholding names and addresses of gun owners, gun purchasers, and the locations where traced firearms were recovered by

[22] Congress amended the FOIA again in 1996. Among other changes, the 1996 amendments clarify Congress's intent that an FOIA request may be made "for any public or private purpose." Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, § 2(a)(1), 110 Stat. 3048 (1996) (Findings). The Senate Judiciary Committee Report accompanying the 1996 Amendments states that the Findings section was intended to:

> address concerns that the reasoning of the Supreme Court in *Reporters Committee* and [ ] *U.S. Department of Defense v. Federal Labor Relations Board* analyzed the purpose of the FOI Act too narrowly. The purpose of the FOI Act is not limited to making agency records and information available to the public only in cases where such materials would shed light on the activities and operations of Government. Effort by the courts to develop a 'core purpose' for which information should be released imposes a limitation on the FOI Act [that] Congress did not intend and which cannot be found in its language and distorts the broader import of the Act in effectuating government openness.

S. Rep. No. 272 at 26-27 (1996) (Additional views of Sen. Leahy). The Archive refers the Court to the brief of *amicus curiae* Reporters Committee for Freedom of the Press for a full discussion of the impact of the 1996 amendments to the FOIA with regard to the "central purpose" test articulated in *Reporters Committee* and will not restate those arguments here. Even if the Court determines that Congress's 1996 amendment of the FOIA failed to reverse the "central purpose" standard for the purposes of the Exemptions 6 and 7(c) balancing test, the Court should not accept the BATF's invitation to broaden the exemption still further, and should clarify that the "central purpose" standard has no bearing outside the context of the privacy balancing test at issue in this case.

contending that individuals have a privacy interest in the information and that its release would threaten an unwarranted invasion of privacy. If the Court determines that there is no privacy interest in the withheld records, then it need go no further in its analysis, as the BATF's invocation of Exemption 7(c) itself would be unwarranted. If, however, the Court finds a privacy interest, then it must consider whether disclosure of the specific information withheld on privacy grounds "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(c). Under the balancing test, the nature and seriousness of the impact on privacy is weighed against the public interest in the disclosure of the particular information at issue.

The court below identified a number of important public interests in the withheld information, including an interest in evaluating the Bureau of Alcohol, Tobacco and Firearms' performance of its statutory duties of tracking, investigating, and prosecuting illegal gun trafficking, an interest in evaluating patterns of gun violence and distribution in the country, an interest in the public policy issue of whether stricter regulation of firearms is necessary, and an interest in enhancing the City's own law enforcement efforts as it seeks to take legal action against gun marketing practices. The lower court's identification of these public interests as relevant in the balance against privacy is fully consistent with the teachings of *Reporters Committee*. In examining the public interest side of the balance in this case and determining whether the withheld information explains "what the[ ] government is up to," *Reporters Committee*, 489 U.S. at 775, or "contribut[es] significantly to public understanding of the operations or activities of government," *Fed. Labor Rel. Bd.*, 510 U.S. at 495 (quoting

Reporters Committee, 489 U.S. at 775) (emphasis removed), the Court should reject the BATF's proposition that these interests are irrelevant simply because they do not address alleged wrongdoing by the BATF.

The BATF seeks to close off any consideration of the Respondent's proffered explanations of what the records will show by contending that there is no relevant public interest in information about individuals in federal records "unless disclosure of the information at issue would meaningfully assist the public in *evaluating* the conduct of the federal government." Pet. Br. at 28 (emphasis added). Applying this narrowed articulation of the *Reporters Committee* standard, the BATF asserts that the information sought by Respondent would not "cast light on ATF's performance of its statutory responsibilities." *Id.* at 29. Even more radically, the BATF argues, citing no support in the FOIA or its legislative history, that only an FOIA requester with evidence of "government illegality," Pet. Br. at 32, could ever hope to gain access to the information that was withheld here.

The Court has recently rejected the concept that the FOIA is a tool only for "cast[ing] light on existing government practices," *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 15 (2001), explaining that exemptions must be "read strictly in order to serve FOIA's mandate of broad disclosure, which was obviously expected and intended to affect Government operations." *Id.* (analyzing whether records were exempt from disclosure under Exemption 5) (internal footnote citation deleted). Indeed it would turn the FOIA on its head to require that the FOIA requester first gather compelling evidence of illegal official activity before any entitlement to government records would be considered.

Similarly here, the Court should reject the BATF's invitation to limit the disclosure mandated by the FOIA through an expansive interpretation of the scope of Exemption 7(c). As the Court has consistently recognized, a narrow construction of Exemption 7(c) is mandated; "the recognized principal purpose of the FOIA requires [the Court] to choose that interpretation most favoring disclosure." *Rose*, 425 U.S. at 366 (quoting *Vaughn v. Rosen*, 523 F.2d 1136, 1142 (D.C. Cir. 1975)); *see also John Doe Corp.*, 493 U.S. at 151; *Ray*, 502 U.S. at 173.

Despite the BATF's characterization, records providing information about government "operations or activities" do not fall only into two buckets – one very small one containing information that assists in the evaluation of whether an agency engaged in misconduct and a vastly larger one containing records that are irrelevant to the FOIA's central purpose. Information about government operations and activities is recognized by the FOIA as relevant to advancing a vast range of public interest reasons aside from "the need to address factually supported claims of government illegality." Pet. Br. at 34.

Here, the lower court found that the records would serve an interest in evaluating the Bureau of Alcohol, Tobacco and Firearms' performance of its statutory duties of tracking, investigating, and prosecuting illegal gun trafficking. This is a public interest justification that clearly falls within the *Reporters Committee* standard.

In addition, the lower court identified an interest in the public policy issue of whether stricter regulation of firearms is necessary and an interest in evaluating patterns of gun violence and distribution in the country. Congress clearly recognized that the public cannot make

informed decisions about policy matters without government information. *See supra* p. 10-12 and footnotes 10, 11, 15. Information that aids an informed electorate, such as information that sheds light on the wisdom of pending legislation, public policy or political philosophy; information that demonstrates the impact of governmental policies on individuals, businesses and U.S. relations with other countries; information about how procedures work, the impact of procedures, and who is responsible for procedures is all clearly information about the "operations or activities" of government and falls within the *Reporters Committee* standard. *E.g., Rose*, 425 U.S. 352 (recognizing a public interest in gaining knowledge about the disciplinary systems and procedures at the military service academies). Such information will rarely provide insight into alleged government wrongdoing, but, if released, could impact privacy considerations.

The court below also identified an interest in enhancing the City's own law enforcement efforts as it seeks to take legal action against gun marketing practices. Congress clearly viewed the vast amounts of information collected for public purposes with public dollars by the myriad government agencies as information accessible under the FOIA. *Supra* p. 11-12 and footnotes 13-15. Such information could include the results of health and safety tests or consumer protection investigations, travel and weather warnings, misconduct by private actors, or data about criminal activity or the indicators of criminal activity. This type of information collected by government agencies quite clearly assists in the understanding of government operations because it is the product of the very services that Americans seek from their government. Such data often contains information about individuals

that may be necessary for assessing the records, but will not be useful to demonstrate that the government engaged in any wrongdoing.[23]

The Court's post-*Reporters Committee* cases do not mandate the BATF's narrow read of the relevant public interest. In *United States Department of Defense v. Federal Labor Relations Board*, 510 U.S. at 497, the Court explained that the relevant interest is the extent to which disclosure of the information would "shed light on an agency's performance of its statutory duties" or otherwise let citizens know "what their government is up to." Similarly, in *Bibles v. Oregon Natural Desert Association*, 519 U.S. 355 (1997), the Court, in an Exemption 6 case, again explained that the relevant public interest in the FOIA privacy balancing analysis is the extent to which disclosure would shed light on an agency's performance of its statutory duties, as well as to otherwise let citizens know what their government is "up to." Knowing what the government is "up to" clearly encompasses knowledge of how the government operates, the impact of government actions on others, the philosophy of the government, the implementation of government services, and how the government enforces its laws.

[23] The FOIA also demonstrates a clear purpose of preventing the government from enforcing secret law and ensuring that citizens know in advance the standards and precedents that will be followed by the government. *See Reporters Committee*, 489 U.S. at 796 n. 20; *supra* p. 11-12 and footnotes 13-15. Understanding the law that will be applied to the populace and who is enforcing the law is quite clearly included within the ambit of knowing about government "operations or activities," although it may have nothing to do with evaluating government conduct.

However it is decided, this case presents no need for the Court to broaden Exemption 7(c) by truncating the established range of public interest justifications that could weigh against withholding agency records to the mere evaluation of government conduct.

C. THE "CENTRAL PURPOSE" STANDARD HAS NO BEARING ON THE GENERAL DISCLOSURE STANDARDS OF THE FOIA

The Court's articulation of a "central purpose" test in *Reporters Committee* has had a far-reaching impact extending beyond the Court's determination. Lower courts have begun to undermine the FOIA's disclosure goals in circumstances in which personal privacy is not implicated. For example, in *Sweetland v. Walters*, 60 F.3d 852 (D.C. Cir. 1995) (per curiam), the D.C. Circuit Court of Appeals upheld denial of a FOIA request for a former White House Chef against the Executive Residence Staff of the White House for employment discrimination. Although the issue in the case was whether the Executive Residence Staff is an "agency" under the FOIA, the D.C. Circuit Court of Appeals refuted the FOIA requester's argument about the public policy behind the categorization of an agency by explaining "FOIA was intended to enlighten citizens as to how they are governed." (Citing *Reporters Committee,* 489 U.S. at 775 (noting that "core purpose" of FOIA was to contribute "significantly to public understanding *of the operations or activities of the government*") (emphasis in original)). Exemptions 6 and 7(c) or even the issue of privacy were not at issue in *Sweetland*.

Similarly, in *Baizer v. United States Department of the Air Force*, 887 F. Supp. 225 (N.D. Cal. 1995), the District Court for the Northern District of California analyzed

whether an electronic copy of the Air Force's computerized database of Supreme Court opinions should be considered an "agency record" under the FOIA. Like the D.C. Circuit, the court applied the "central purpose" test and examined whether the database was created to reveal the agency's activities. Because it was not created for the purpose of revealing agency activities, the court determined that the database was not a record. Privacy was not an issue in the case.

The Court clearly did not intend to apply the "central purpose" test beyond the confines of Exemptions 6 and 7(c). For example, in *Department of Justice v. Tax Analysts*, 492 U.S. 136 (1989), decided after *Reporters Committee*, the Court required the disclosure of Department of Justice compilations of district court tax decisions to the publishers of a weekly magazine even though such disclosure would not add to public understanding of government operations or activities. It is critical, therefore, that, if the Court addresses the factors considered in the privacy balancing test used to evaluate withholding determinations based on Exemptions 6 and 7(c), it clarify that the lower courts are not to apply a "central purpose" limitation to the other provisions of the FOIA.

Lower courts' expansive invocation of the "central purpose" standard poses grave danger, as it could close off public access to critical information needed by the public to protect its health and safety and to rectify wrongs committed by private actors against the public interest. Throughout the history of the FOIA, Congress has been well aware of the wide range of types of information disclosed by government agencies, as well as the important public and private benefits that result from these disclosures. In Senate hearings over 20 years ago, there

was clear evidence that the FOIA was being used to unearth information relevant to both public and private interests that did not specifically relate to evaluation of government conduct or to government operations and activities. *See* Freedom of Information Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. at 131 (1981) (describing the FOIA's role disclosing, among numerous examples, the deaths of elderly patients at a private Philadelphia nursing home during 1964 and 1965 while they were subjects in a drug experiment, *id.* at 924; misuse of federal grants by organizations that were supposed to be fighting alcoholism, *id.* at 931; information about exploding television sets and the potential dangers of aluminum wiring in Consumer Product Safety Commission files, *id.* at 933, 937; use of intelligence satellites by the CIA to observe American students involved in demonstrations, *id.* at 943; a Federal Trade Commission study suggesting that private cancer insurance was a "poor buy", *id.* at 944; information held by the U.S. Public Health Service disclosing that Utah residents suffered an unusually high proportion of birth defects because of atomic bomb testing from 1950 to 1964, *id.* at 941; the impact of Japanese non-tariff barriers on sales in Japan, *id.* at 920). Congress has never taken any action to prevent the FOIA's use for these diverse purposes because Congress intended all along to advance the public right of access to these types of government records.

Moreover, in amending the FOIA in 1996, Congress added Findings that recognize that the FOIA has "been a valuable means through which any person can learn how the Federal Government operates"; "has led to the disclosure of waste, fraud, abuse, and wrongdoing in the Federal

Government"; and "has led to the identification of unsafe consumer products, harmful drugs, and serious health hazards." 5 U.S.C. § 552 (Findings).

Even in the last two years, the FOIA has resulted in dramatic releases of information of great public importance. For example, in *Eating Well: Second Thoughts on Mercury in Fish*, by Marian Burros, N.Y. Times, March 13, 2002 at F5, it was reported that documents released pursuant to FOIA requests to the Food and Drug Administration revealed pressure from the commercial tuna fish industry to exclude tuna from the FDA's recommendation that pregnant women avoid certain fish because of high levels of mercury contamination that could cause brain defects or delays in the mental development of their children. The release of these documents thus informed pregnant women of an important protection to take during their pregnancy.

In *Recycled Uranium Spread Wider Than Thought*, USA Today, June 25, 2001 at 7A, documents released pursuant to the FOIA were reported to indicate that contamination with plutonium may have reached more than 100 federal plants, private factories and colleges. This information permitted affected people to make informed choices about the risks of contaminated locations.

In *Ritalin Prescribed Unevenly in U.S.*, Cleveland Plain Dealer, May 6, 2001 at 1A, it was reported that DEA data obtained through the FOIA shows dramatic variations by county in prescription rates for Ritalin taken by three million children. Such information allowed parents to better evaluate the recommendations of their children's physicians. As demonstrated by this small sampling of

news articles written in reliance on documents released under the FOIA, any narrowing of the scope of the FOIA's disclosure provisions to a core purpose related solely to government operations or activities would harm the public interest.

Openness is consistent with the core values of a democratic society. The efforts of the National Security Archive itself have frequently resulted in the release of important information that does not necessarily expose the operation of the U.S. government, but which promotes the public interest and U.S. national security interests in democratization and the rule of law abroad. For example, declassified American documents obtained by the National Security Archive were relied on in the human rights violation trials of Guatemalan army officers. *The Army on Trial*, The Economist, Sept. 21, 2002. Documents obtained by the Archive concerning the Cuban Missile Crisis persuaded the Cuban government to declassify its own records of the events, including documents concerning Cuba's relationship with the U.S.S.R., Soviet military assistance, a list of weapons, and the text of secret treaties with the U.S.S.R. "*The Cuban Missile Crisis 1962: The Documents*," *available at* http://www.gwu.edu/~nsarchiv/nsa/cuba_mis_cri/docs.htm (selected declassified documents from United States, Soviet and Cuban files). Documents obtained by the Archive through FOIA requests to the Central Intelligence Agency, the Federal Bureau of Investigation, the Department of Defense, and other agencies regarding the 1968 Tlatelolco massacre initiated the debate in Mexico that led to enactment in 2002 of a freedom of information law in that country. Molly Moore, *Unveiling a Hidden Massacre*, Wash. Post, Oct. 2, 1998 at A29. Documents released by several U.S. agencies

pursuant to Archive FOIA requests were cited as critical to the United Nations Commission on the Truth for El Salvador. Thomas Buergenthal, *The United Nations Truth Commission for El Salvador*, 27 Vand. J. Transnat'l L. 497, 509-510 (1994).

If the Court reaches the issue of the *Reporters Committee* "central purpose" standard, it should clarify that the standard has no bearing beyond the confines of Exemption 6 and 7(c) privacy balancing. To permit the lower courts to rely on *Reporters Committee* as stating a limited "central purpose" allows a judicial dismantling of the right to know that Congress codified in the FOIA and has reaffirmed throughout the 35-year history of the Act.

CONCLUSION

The Court should not constrict the public interests in disclosure identified by the lower court as relevant to the Exemption 7(c) privacy balance. The judgment of the Court of Appeals that an interest in evaluating a government agency's performance of its statutory duties, an interest in public policy issues concerning firearm regulation, and an interest in promoting effective gun regulation are relevant public interests to be considered in the Exemption 7(c) privacy balance should be affirmed.

Respectfully submitted,

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February 5, 2003